

HENRY GAGE, Esq;
Appellant.

ELIZABETH LISTER, Widow,
Respondent.

The Appellant's C A S E.

14 Feb. 1685. **T**he Appellant married the Lady Elizabeth Boteler, the Widow and Relict of Sir John Boteler, who dyed the 10th of March, 1682.

That the said Lady giving Ear to Persons who had no good Will to the Appellant, Misunderstandings unhappily fell out betwixt them: And in June, 1687, a Separation was mutually agreed betwixt the Appellant and his said Wife.

Whereupon a separate Maintenance of 300 l. per Annum was settled on her by the Appellant; out of which, and of other great Sums of Money, whereof she was possessed at her Inter-marriage, and which she concealed from the Appellant, she yearly laid up or placed out at Interest, considerable Sums of Money in the Hands of Trustees, to the Intent that the same might be concealed from the Appellant.

The said Lady Boteler becoming acquainted with the Respondent Lister, who was the Widow of a Tradesman in London, who failed in his Trade, and left the said Lister in mean Circumstances; she, the said Respondent, for her Support, after his Death, kept an India Shop, and let Lodgings; and the Appellant's Wife, coming to lodge at her House, the Respondent by her Insinuations, became her Chief Companion and Confident.

The said Lady Boteler, the Appellant's Wife, about the Month of February, in the Year of our Lord 1696, there being then 1000 l. paid in to her, did place the Sum of 500 l. part thereof in the Hands of Mr. Lawton. And the said Mr. Lawton and one Mr. Mountague did give a Note in the Words following, viz.

London, 26th Febr. 1696

Received then, and Borrowed of Mrs. Lister 500 l. of Lawful English Money, which we hereby promise to Re-pay to the said Elizabeth Lister, or Bearer, upon Demand: Witness our Hands,
Ra. Lawton, Chr. Mountague.

But altho' the said Note was taken in the said Lister's Name, yet it was the Lady Boteler's Money, and the Name of the said Lister, was only in Trust for the Appellant's Wife; and the said Lister, never had the Custody of the said Note, in the Life of the Appellant's Wife; and though the Note did not carry Interest, yet by secret Agreement between the Lady Boteler and Mr. Lawton, he all along paid her Interest for it, during her Life: But the Appellant's Wife continuing to lodge at the Respondent's House, and there happening to dye, when none of her Friends or Relations were about her, the Respondent possessed herself of all her Cabinets, Boxes, Papers, Writings and Personal Estate, then at the Respondent's House, to a very great Value.

That the Respondent, after the Death of the Appellant's Wife, set up a Nuncupative Will, whereby she pretended to intitle herself to the said Note, and all the Estate of the Appellant's said Wife; but being advis'd that the same was Invalid, she then offered 250 l. to the Appellant for a Composition, which being refused, she then at last claimed the said 500 l. as a Gift.

The Respondent and Appellant both claiming the said 500 l. and the Executors of the said Mr. Lawton being sued at Law by the said Mrs. Lister upon the said Note, the said Executors brought a Bill of Interpleader in the Court of Chancery, in Order that the Respondent and Appellant might controvert their Right to the said 500 l. which Sum was brought into Court by the said Mr. Lawton's Executors, to attend the Event of the said Suit.

24 Jan. 1704.
Cause heard in
Chancery.

The Cause was heard before the late Lord Keeper Wright, who decreed the 500 l. and Interest to the Respondent, with Costs, to be paid to her and Mr. Lawton by the Appellant: Which Decree, the Appellant is advised, and humbly conceives, is erroneous, and ought to be reversed.

The Question in the Case is, *Whether the Note for 500 l. was a Gift from the Lady Boteler, to the Respondent, or a Trust for the Lady Boteler?*

1. It is incumbent upon the Respondent to make out the Gift, as by her Answer is pretended, which she hath not done; nor is there any Proof in the Cause, that the said Respondent had at any time, during the Life of the Appellant's Wife, the said Note for 500 l. in her possession, or made any Demand thereof, or Pretence thereunto; and it is the most improbable Thing imaginable, That the Appellant's Wife should give away such a Sum as 500 l. in her Life-time; for Mrs. Lister was no manner of Relation to the Lady Boteler: And why she (who it appears in the Proofs of the Cause, loved Money so well) should give away 500 l. at one time, and when she was in Health, is very strange; for the pretended Gift is near four Years before her Death.
2. This contradicts the Pretence of the Nuncupative Will, which was the Title that the Respondent first set up; and which, when it failed her, she knew so little of any other Title, that she offered 250 l. for a Composition.

On the contrary, that this Note was a Trust for the Lady Boteler, appears (as the Appellant is advised) from all the Circumstances of the Case; because it is admitted, by the Respondent herself, in her Answer, that the 500 l. in Question originally was the Lady Boteler's Money. It is proved, She had great Sums of Money, and used to lend it out in Trustees Names, to conceal it. That this was always esteemed by Mr. Lawton to be the Lady Boteler's Money, and she received the Interest; and during all the Life of the Lady Boteler, which was near 5 Years after the Money lent, the Respondent Lister never pretended to demand either Principal or Interest of Mr. Lawton.

The 500 l. Note was payable to the Respondent or Bearer, and consequently the Appellant's Wife, having always had the Custody of the said Note, she had the same Right of demanding the said 500 l. from Mr. Lawton, and giving him a legal Discharge, by delivering up the said Note to him on payment, as if the said Note had been taken in her own Name.

Fr. Wilkinson.